UNITED STATES OF AMERICA
DISTRICT OF MAINE

DONALD FRANCIS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 00-80-B-K
	)	
ROB ANGELO, et al.,	)	
	)	
Defendants	)	

MEMORANDUM OF DECISION[1]

Defendants, Rob Angelo, Allen Woolley, and Butch Moor, have moved for summary judgment on all claims made by plaintiff, Donald Francis in his 42 U.S.C. § 1983 complaint alleging that the defendants violated his constitutional rights when they arrested him.[2] After examination of the material facts both disputed and not disputed, I **GRANT** summary judgment in favor of defendant Moor, but **DENY** the motion with respect to Francis's Fourth Amendment § 1983 claim against defendants Angelo and Woolley. I conclude that there is a genuine issue of material fact as to their liability, and that they are not entitled to judgment as a matter of law.

Summary Judgment Standard

I will grant the defendants summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits [they have filed] show that there is no genuine issue as to any material fact and that [they are]

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[1] Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

[2] Francis's § 1983 Complaint seeks compensatory damages and punitive damages. Further he wants the court to enjoin the defendants from retaliating against him. With respect to his legal argument, Francis claims that the defendants' conduct qualifies as excessive use of force violative of the Fourth and Eighth Amendments. The defendants dispute most of Francis's factual and legal contentions. They also have asserted multiple defenses to Francis's federal (and unasserted) state law claims.

entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A "material fact" is one that might affect the outcome Francis's suit under § 1983. *Fajardo Shopping Ctr., S.E. v. Sun Alliance Ins. Co., Inc.*, 167 F.3d 1, 6 (1st Cir. 1999). I view the record on summary judgment in the light most favorable to Francis, as the nonmoving party. *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 50 (1st Cir. 2000).

If the defendants have evidenced an absence of a genuine issue, substantiated by a rendition of fact that, if uncontroverted, would entitle them to judgment as a matter of law, the burden then shifts to the plaintiff. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 244, 250 (1986).

As a consequence, the plaintiff's response must "plac[e] at least one material fact into dispute," *FDIC v. Anchor Props.*, 13 F.3d 27, 30 (1st Cir. 1994*) (citing Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)), and must "make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Factual Background

Francis is currently in custody with the Maine Department of Corrections following his convictions for five offenses related to events that transpired on November 25, 1999. The three defendants are police officers employed by the City of Bangor, all certified by the State of Maine as police officers. Named defendant Orval "Butch" Moor was not on duty during the incident and was in no way involved in the Francis arrest.

The relevant events of November 25, 1999, commenced at 1:05 a.m. Angelo was parked across from a convenience store when he saw a car, operated by Francis, without its headlights on drive up to and park on an adjacent street. Francis had been drinking

since 10 p.m. Francis left the car and jogged across the street toward the store, stumbled and fell down a hill into the parking lot, then got up and entered the store. In short turn, the door to the store flew open and Francis ran out at full speed. Francis carried a six-pack of beer for which he had not paid. Responding to Francis's flight, a group of onlookers waved at Angelo, some yelling, "Stop him, get him."

Francis raced to his vehicle and pulled away at a rapid rate. A chase at a very high speed ensued, with Angelo engaging his siren and all his emergency lights. During the chase Francis made a sudden and erratic change of route, traveled at speeds at times easily exceeding 100 miles per hour, and passed cars on their left side. It was when he was attempting to negotiate one of these passes that he lost control of his vehicle; Francis hit a car he was passing, sending his car skidding sideways. At this juncture the accounts part way.

A. "They say" – the defendants' version of events

The third-party car went into a spin, into a ditch, and into a utility pole, severing it.[3] The Francis car entered a spin then 'headed' into a ditch back-end first, ending up sideways.

Angelo pulled over and called for two ambulances. He moved to check on the occupants of the third-party car, but noticing that Francis was out of his car and running away, he began to chase Francis up the hill. He yelled for Francis to stop but got no response. He chased Francis "for some distance." Angelo closed in on Francis, grabbed hold of the back of his belt, and pulled him back towards him.

[3] Though the defendants' statement of material fact describes the Francis car as traveling the length of the ditch, striking a driveway, spinning around, and hitting a utility pole head-on, the Angelo affidavit cited to indicates that it was the car Francis was attempting to pass that took this course.

Francis turned and swung at Angelo, hitting him on the shoulder. Francis became assaultive. Angelo got close to Francis again and wrestled him to the ground. Francis again swung at Angelo this time hitting him in the back. Angelo then grabbed Francis by the hair and pulled him to the ground. Francis persisted in resisting arrest, attempting to bite Angelo and continuing to fight. Angelo "had all he could do in keeping Francis on the ground until help arrived."

At the time of the arrival of Woolley and Moore, Francis was not yet handcuffed. They witnessed Francis struggling with Angelo and resisting Angelo's efforts to subdue and arrest him. Angelo was on top of Francis's shoulders, with Francis face down on the ground and his head pointed away from the road. Angelo was not carrying a flashlight or an impact weapon; only Woolley, who arrived later in the Francis sequence, was so 'armed.'

Woolley reached Angelo and Francis before Moore. Woolley, in the hopes of getting Francis under control, tried to hit him below the armpit with his knee and the handle of his flashlight, which he was holding by the lens. His object was to hit Francis on his side, above the ribs in order to squelch Francis's resistance. This procedure was consistent with Woolley's training to use impact weapons in muscle areas. Woolley now believes that at this point he may have made contact with Angelo's elbow, causing Angelo to withdraw from the attempt to arrest.

The defendants state that Woolley lost his flashlight as a result of "the contact" and did not use it again. It is not clear from the defendants' statement of material fact or the cited affidavit whether they refer here to the flashlight's contact with Angelo or Francis. Moore was at this point sitting on top of Francis who was still facedown,

struggling, and ignoring the officers' verbal commands to release his arms from under his chest and to submit to arrest.

Moore gave "softening blows" to Francis in the area of his kidneys and Woolley made additional contact around his right arm to free it for handcuffing, a task that was eventually accomplished. The defendants state unequivocally that after Francis was handcuffed he was not struck and that no one uttered racial slurs.

B. "He says" – Francis's version of events

The Francis deposition tells a different tale. First, he describes an abbreviated version of his collision with the third-party vehicle and his slide into the ditch. He disputes that his car ran the length of the ditch and struck the driveway. He states that he hit the third-party car when the rear of that car drifted into the 'passing' lane, causing his car to spin once or twice or thrice in the middle of the road. He then landed in the roadside ditch. Francis describes the ditch as "soft" and muddy. He states that he did not hit anything, did not total the car, and did not injure himself. He went into the ditch front first, landing at a slight angle with his front facing a grassy mound, and unsuccessfully attempted to back out up onto the road. He then got out of his car unhurt and ran, no more than 20 yards, to the peak of a grassy mound. He wore a seat belt throughout the chase and the crash and was in no way injured at the time he got out of the car.

When Angelo grabbed him by the belt he knew he wasn't going anywhere. Francis turned around to look at Angelo, and was struck in the face by his fist, breaking his nose. Francis immediately went down on to his knees. Francis did not struggle but

told Angelo to leave him alone because Angelo was hitting him, on the "[t]op of his head, wherever he could."[4]

Francis saw "something black" in Angelo's hand, a flashlight or billy club, and he lost consciousness.[5] When he came to he was dizzy and his vision was fuzzy. He could not see the officers' faces but he thinks there were three. He was in handcuffs, with his arms behind his back, other officers were present, and he was being hit. He begged them to stop hitting him and they did not relent. When he regained consciousness one of the officers was pulling his handcuffs up and another officer was "putting the knuckles" to his head. He knows that he was hit once with the flashlight and was "pounded in the head numerous times," maybe with fists He knows for sure that at least two of the officers hit him. Francis states: "It was like they were pelting me. I was begging them to stop. They were having a free-for-all." He had bumps all over his head. The officers directed racial slurs at him more than once.

In his statement of disputed facts Francis does not contest that shortly after the arrival of Woolley and Moore, Angelo injured his elbow, rolled off Francis, and had no further involvement. He also acknowledges that it might have been Woolley who

[4] In regards to the allegations that he struck and hit Angelo, Francis, in the hopes of undercutting Angelo's credibility on this account, protests that he has sought Angelo's medical records twice to no avail and was forced to file a motion to compel. In response to the motion to compel, Angelo asserted the patient/physician privilege. On January 8, 2001, I denied the motion to compel but provided that the defendants were barred from presenting evidence as to the extent and nature of any injury to Angelo allegedly stemming from the chase and arrest.

[5] Francis suggests that this dispute, a key component of his excessive force complaint, is a question better answered in court. He is certain that he saw a "long black object" swinging through the air and that it was this object that hit him on the head. The blow stunned and dazed him, and so the exact details as to the wielder of the weapon and the timing are not clear in his mind.

wielded the flashlight, and that Woolley may have hit Angelo on the elbow and delivered the blow to Francis's head.[6]

It is not disputed that thereafter Francis was transported to a hospital emergency room.[7] Francis describes his injuries and treatment associated with the incident in his deposition, listing a broken nose that was set and casted, a injury in the middle of the back of his head requiring stitches, and recurring nausea and headaches.

Clearly, there is more than one fact in dispute. The question becomes whether the disputed facts are material to Francis's legal theories, and are ones that might, depending on the proof at trial, affect the outcome of his suit.

Discussion

I. Application of the Summary Judgment Standard to these Pleadings

The defendants' motion is well-crafted and their statement of material fact is structurally sound, with record citations to the attached affidavits of the three defendants and a fourth officer, Douglas J. Moore; the deposition of Francis with attached exhibits; a certified copy of the state court docket record, and his judgment and commitment; and a copy of the Bangor Police Department's excessive force policy.

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[6] Francis cites to the Bangor Police Department's "Use of Force" Policy which sets out a continuum of force, commencing with officer presence and elevating through "verbal commands, compliance techniques, disabling pepper agents, impact weapons," and culminating with deadly force. Francis asserts that Woolley jumped the continuum's ladder and commenced his efforts by using deadly force, to wit, striking Francis on the head with an impact weapon. He also quotes to the "Use of Force" policy section on impact weapons: "Officers may have to rely on an impact weapon to subdue a violently resisting subject. Large muscle groups are recognized as the only acceptable target areas for strikes. Blows delivered to the head could prove fatal and are to be avoided unless deadly force is authorized." Woolley's excess of force in view of the policy, in Francis view, presents a triable issue.

[7] The final squabble with respect to the statements of material facts concerns whether or not Francis told a friend while at the hospital something to the effect that "he should have died because he really messed up this time." Perhaps the defendants view this as an admission by Francis. For the purpose of my current analysis it is not pivotal.

The difficulty at this juncture is whether Francis's response adequately carries his burden to allow him to move beyond the summary judgment stage. It is a close call.[8] Though Francis's response is not exemplary, he does respond to selected numbered paragraphs of the defendants' statement of material facts by corresponding numbered paragraphs. For the most part he disputes the description of events provided by the defendants, countering with his own description of what transpired. And for the most part he sticks to the facts and does not resort solely to rhetoric and surmise. The

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[8] The First Circuit has acknowledged that some judicial tolerance is appropriate when a court construes a *pro se* party's pleading. See *Gilday v. Boone*, 657 F.2d 1, 2 (1st Cir. 1981) (addressing a *pro se* prisoner's complaint that failed to mention § 1983, deciphering sufficient allegations of deprivations of federal rights, observing, "It is clear that … a *pro se* litigant [is] entitled to have his pleadings liberally construed"). *See cf. Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam) (reviewing and reversing a Rule 12(b)(6) dismissal of a *pro se* prisoner's § 1983 complaint, concluding that the allegations of injuries and deprivation of rights "however inartfully pleaded, [were] sufficient to call for the opportunity to offer supporting evidence," stating that it holds the allegations in a *pro* se complaint "to less stringent standards than formal pleadings drafted by lawyers").

At first blush it would seem that this liberal construction ought to be no more constrained when a *pro se* plaintiff such as Francis is called to respond to a motion for summary judgment. *See Garcia v. Burns*, 787 F.Supp 948, 949 (D. Nev. 1992) (ruling on a motion for summary judgment filed by § 1983 defendants against a *pro se* prisoner plaintiff, observing the need to hold the plaintiff's pleading to a "less stringent" standard than pleadings drafted by lawyers). However, deference to the plight of the *pro se* pleader must be counterbalanced against the policy concerns that animate the rigorous pleading requirements of Federal Rule of Civil Procedure 56 and our complimentary local rules.

As to form, the local rules require that the defendants' statement of material facts be set forth in numbered paragraphs with each factual assertion supported by record citations. D. Me. Loc. R. 56. In his opposing motion Francis is directed to include a separate statement of material facts with each factual denial, qualification, or addition supported by a record citation. Id.

The form requirements of our local rule serve a function dictated by the Federal rules and case law, pinpointing for the parties and the court where, if anywhere, the record provides a basis for going forth to trial. As a *pro* se respondent, Francis did follow the Local Rule in terms of his numbered paragraphs and admissions and denials. His failure of form consisted primarily in a failure to include record citations to his deposition testimony. The local rules make my disregard of an improperly supported or citated statement of material or disputed facts discretionary. *See* D. Me. Loc. R. 56; *see also cf. Gilday*, 657 F.2d at 2 & n.2 (concluding that despite the absence of allegations of dates and facts giving rise to the violation for which the *pro se* prisoner sought redress, the District Court ought not to have dismissed the damage claims for want of supporting factual allegations).

The absence of record citations, frankly, flirts with disaster. The rules make clear that "mere allegations or denials" do not a triable issue make. Fed. R. Civ. P. 56(e); *see also Cadle Co. v. Hayes*, 116 F.3d 957, 960 (1st Cir.1997) ("effusive rhetoric and optimistic surmise" not enough to carry non-movant's burden). Any latitude offered Francis as a *pro se* summary judgment respondent is constricted by the necessity that his response sets forth facts that dispute the factual rendition of the movants. *See King v. Cuyler*, 541 F. Supp. 1230, 1232 n.3 (E.D. Pa. 1982) (addressing prisoner's argument that he deserved extra latitude in responding to a motion for summary judgment as his complaint was filed *pro se* while he was incarcerated, stating that "*pro se* civil rights pleadings are entitled to liberal construction," but observing that the plaintiff "must still set forth facts sufficient to withstand summary judgment").

statements do not stray far from his deposition testimony and I note that Francis filed his response after his deposition testimony was part of the summary judgment record before me. His statement of material facts, while not providing record citations, for the most parts restates his sworn factual account in the deposition. *See Torres v. E.I. DuPont de Nemours & Co.*, 219 F.3d 13, 20-21 (1st Cir. 2000). This is not a case of complex civil litigation where the Court is called upon to mine a huge record to locate the appropriate citations. Indeed, Defendants' own Statement of Material Facts provides record citations to many of Francis's allegations in his deposition testimony.

Therefore, taking the motion and response together, I must determine if "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. I make this determination "through the prism" of "the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.* at 252, 254.

II. Issue preclusion in Light of State Court Plea

Before addressing how the facts relate to the pertinent legal principles, I dispose of the defendants' argument that, if accepted by this court, would significantly change the factual complexion of this case. The defendants contend that Francis, because of his guilty plea to the charge of refusing to submit to arrest or detention, is barred from asserting certain factual and legal arguments.

With some potential exceptions,[9] Maine law determines the preclusive effect of Francis's guilty plea. *Napier v. Town of Windham*, 187 F.3d 177, 184 (1st Cir. 1999) (examining preclusive effect of a § 1983 plaintiff's criminal jury conviction, applying

[9] The Supreme Court has observed that "additional exceptions" to preclusion, warranting the disregard of a conflicting state rule of law, might be necessary in § 1983 cases to protect a federal right shunned or short shrifted by the state court. *Haring v. Prosise*, 462 U.S. 306, 314 (1983).

Maine law); *see also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 466 & n.6 (1982)(citing 28 U.S.C. § 1738).

The Maine Supreme Judicial Court sitting as the Law Court has not fully determined the extent to which a defendant who entered a guilty plea in a criminal prosecution is "collaterally estopped from relitigating the factual issues underlying the conviction in a later civil action." *Hanover Ins. Co. v. Hayward*, 464 A.2d 156, 160 n.6 (Me. 1983). In *State Mutual Insurance Co. v. Bragg* the Law Court did preclude an insured who had plead guilty to murder and attempted murder from relitigating his "subjective intent to cause bodily injury," because the plead-to offenses were crimes "in which the intent to cause, or the expectation of causing injury[,] inheres." 589 A.2d 35, 38 (Me. 1991). But the court stressed that its exception was "narrow," and that it would "intimate no opinion as to the preclusive effect of other criminal convictions upon later civil actions." *Id. See cf. Haring v. Prosise*, 462 U.S. 306, 312- 17 (1983)(concluding that the Virginia courts would not invoke the doctrine of collateral estoppel to bar a petitioner who plead guilty to a charge for manufacturing a controlled substance from later litigating the legality of a search in his § 1983 action against the officers participating in the search that led to his arrest).

Deciding this point today is unnecessary because the nature of the charge Francis plead to prevents the defendants from asserting that the precise issues at stake in this case were decided by his plea.

The Grand Jury charge on Count X reads:

That on or about the 25th day of November, 1999, in the City of Bangor, County of Penobscot, State of Maine, DONALD J. FRANCIS did with the intent to hinder, delay or prevent a law enforcement officer from effecting the arrest or detention use physical

force against the law enforcement officer or create a substantial risk of bodily injury to the law enforcement officer.

This language tracks the language of the Maine Criminal Code's provision, "Refusing to submit to arrest or detention." 17-A M.R.S.A. § 751-A (West Supp. 2000).

The difficulty for the defendants is that Francis plead guilty to a charge that was phrased in the alternative: he conceded that he ***either*** used physical force against ***or*** created a "substantial risk of bodily injury" to one of the arresting officers. *See Lalumiere v. Miller*, 1998 ME 274, ¶¶ 8-9, 722 A.2d 46, 48 (concluding that the civil suit defendant's prior general verdict of guilty for robbery did not establish his liability for battery because the charged offense had two alternatives, he could have either attempted to inflict ***or*** have actually inflicted bodily injury); *see cf*. *United States v. Weeks*, 2000 WL 1879808 (D.Me. 2000)(arriving at a similar conclusion with respect to a defendant's "nolo" plea to an assault charge, concluding that the plead-to charge did not necessarily constitute a crime in which physical force was used or threatened within the meaning of the United States Sentencing Guidelines because the Maine assault statute is applicable to conduct that causes bodily injury ***or*** "offensive physical contact," and the latter alternative did not necessarily involve physical force).

By pleading guilty Francis need only have conceded that he led Angelo on a high-speed chase, which he does so concede, and that he thereby "created a substantial risk of bodily injury." Francis, in his sworn deposition, has characterized the car chase as high risk, and accepted that he ran into a second car sending it into the ditch and a utility pole.

III. Resolution of Defendants' Summary Judgment Motion

By virtue of the Fourteenth Amendment, Francis's Fourth and Eighth Amendment claims are cognizable against the defendants who were acting under the color of Maine

law when they arrested Francis. *See Wilson v. Seiter*, 501 U.S. 294, 296-97 (1991) (analyzing Eighth Amendment claim against state via the Fourteenth Amendment); *Alexis v. McDonald's Rests. of Mass., Inc.*, 67 F.3d 341, 351 (1st Cir. 1995) ("A section 1983 claim does not lie absent state action.").

A. Eighth Amendment

To the extent that Francis is still asserting his Eighth Amendment claim, I grant the defendants summary judgment on this claim. Francis does not make allegations that he was "incarcerated" at the time that he suffered his alleged injuries. *See Wilson*, 501 U.S. at 297 (Eighth Amendment "prohibits the infliction of 'cruel and unusual punishment' on those *convicted of a crime*")(emphasis added).

B. Fourth Amendment and Qualified Immunity

With respect to the gravamen of Francis's complaint, his assertion that his Fourth Amendment right to be free from unreasonable seizure has been violated, the defendants press their motion for summary judgment on two grounds. They argue that they are protected from suit and liability by the doctrine of qualified immunity. Alternatively, based on all the undisputed facts, Francis has not made out a case for a constitutional violation.

1. Qualified immunity

The defendants' entitlement to qualified immunity is judged by an objective standard. It shields Angelo and Woolley, as government employees performing their discretionary functions, from civil liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

I apply two prongs in my qualified immunity analysis. First I ask, "whether the constitutional right in question was clearly established at the time of the alleged violation." *Napier*, 187 F.3d at 183. Second, I determine "whether a reasonable, similarly situated official would understand that the challenged conduct violated the established right." *Id. Accord Aponte Matos v. Toledo Davila*, 135 F.3d 182, 186 (1st Cir. 1998). In other words, it is possible that the defendants violated Francis's clearly established constitutional rights but are immune from suit because it was objectively reasonable for them to do so because the unlawfulness of their actions was not apparent to them. *See Anderson*, 483 U.S. at 640, 643-44 (observing that qualified immunity may extend to actors that violate the constitutional rights of the plaintiff).

The function of the qualified immunity doctrine markedly differs from a determination of substantive liability. Qualified immunity is a doctrine that is intended to assist the defendant at the threshold of a § 1983 action. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 24 (1st Cir. 1995) ("The ultimate question of qualified immunity should ordinarily be decided by the court."); *Roy v. City of Lewiston*, 42 F.3d 691, 694 (1st Cir. 1994) ("Qualified immunity claims, in particular, are to be resolved before trial, where possible."); *Tatro v. Kervin*, 41 F.3d 9, 15 (1st Cir. 1994) ("Qualified immunity, which is a question of law, is an issue that is appropriately decided by the court during the early stages of the proceedings and should not be decided by the jury."). It is an immunity from suit rather than an affirmative defense. *Hunter*, 502 U.S. at 227; *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Souza v. Pina*, 53 F.3d 423, 425 (1st Cir.

1995)("The qualified immunity doctrine enables courts to weed out unfounded suits."); *but see Katz v. United States*, 194 F.3d 962, 968 (9th Cir. 1999)(describing the "qualified immunity defense"). If the defendant's conduct -- as described by the undisputed facts or, if disputed, as described by the plaintiff -- cannot be viewed as objectively reasonable in light of the relevant "abstract issue of law," *Johnson v. Jones*, 515 U.S. 304, 317(1995), then the case must go forward to trial, for a fact-finder to view the totality of the circumstances to determine if the officer's use of force was objectively reasonable.[10]

Identifying whether Francis's complaint implicates a "clearly established right" is a mandatory first step to my qualified immunity analysis. *See Siegert v. Gilley*, 500 U.S. 226, 231-33 (1991)(clarifying analytical structure for analyzing qualified immunity claims, stressing that the first inquiry must be whether the plaintiff has "allege[d] the violation of a clearly established constitutional right"). I must ask a more precise question than whether it was clearly established at the time of Francis's arrest that he had a right to be free from "unreasonable seizure." *See Anderson*, 483 U.S. at 639-40 (identifying a misapplication of the principles underling the "clearly established" query of qualified immunity when the lower court used a very general right "to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances," stressing that the inquiry requires looking at a "more

[10] In the aftermath of *Anderson* and *Graham* many courts have concluded that the "objectively reasonable" inquiry of the second prong of the qualified immunity standard and the standard for liability on an excessive force claim do not only overlap, but are one-in-the-same. *See, e.g., Katz*, 194 F.3d at 968 (collecting cases, describing this as the majority view amongst the circuits). This approach seems to be predicated on the use of "objectively reasonable" in both standards and the fact that the standard for substantive liability for excessive force is part of the qualified immunity determination. The First Circuit has stopped short of embracing this conclusion. *See Napier*, 187 F.3d at 183 (observing the similarity between the inquiry vis-à-vis Fourth Amendment liability and that undertaken with respect to qualified immunity, treating a magistrate's decision that was unclear upon which it rested as a judgment on alternative bases); *St Hilaire*, 71 F.3d at 24 n.2 (noting that the standards have been viewed as one-in-the-same, not deciding the point, but using the excessive force liability standard as guidance for its qualified immunity inquiry).

particularlized" right); *Souza*, 53 F.3d at 425 ("The right must be stated with particularity."). Thus, I ask "whether the force used ... was 'consistent with the amount of force that a reasonable police officer would think necessary to bring the arrestee into custody?'" *McLain v. Milligan*, 847 F. Supp. 970, 976 (D. Me. 1994) (quoting *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 205 (1st Cir.1990)); *accord Fowles v. Stearns*, 886 F. Supp. 894, 901 (D. Me. 1995).

Assuming, as I must, that Francis's version of the incident is true, it was clearly established at the time that it is not necessary to beat an arrestee once he is subdued and nonresistant in order to bring him into custody. This can be stated in the inverse; Francis had a right to be free from the application of gratuitous force by the defendants after he was subdued and non-resistant. *See, e.g., Jones v. Johnson*, 26 F.3d 727 (7th Cir. 1994), *aff'd*, 515 U.S. 304 (concluding that the right to be free from the alleged force was "clearly established," examining similar allegations by arrestee against arresting officers); *Miller v. Smith*, 220 F.3d 491 (7th Cir. 2000) (same); *Fowles*, 886 F. Supp. at 900-01 (same); *see also Priester v. City of Riviera Beach*, 208 F.3d 919, 927 (11th Cir. 2000)(providing thorough discussion of the specificity requirement, concluding that the arrestee/plaintiff had a clearly established right not to have dogs set upon him after he was face down on the ground and non-resistant, even though there was no prior law precisely on point).[11]

The second prong of this inquiry requires me to make the determination of

[11] The black and white character of Francis's excessive force claim makes this a much easier call than that required when faced with a right the contours of which are so subtle that an answer to this prong of the qualified immunity inquiry can be elusive. *See, e.g., Wilson v. Layne*, 526 U.S. 603 (1999)(concluding that officers were entitled to qualified immunity, even though allowing media to accompany them into a home they were searching violated the plaintiff's Fourth Amendment rights, because the right was not clearly established at the time of the search); *Bilida v. McCleod*, 211 F.3d 166, 174 (1st Cir. 2000)(concluding that there was a lack of clarity in the law as to whether the defendants could reasonably believe that a reentry into premises to seize a suspect was protected under the initial warrant).

whether or not Angelo and Woolley could reasonably have believed that their treatment of Francis was lawful. Under this inquiry, the waywardness of the defendants' assertion of qualified immunity becomes apparent. While reasonable officers could believe that they could exert a certain amount of force in subduing the fleeing Francis, no reasonable officer could believe that they could lawfully hit Francis in the head with a flashlight and/or otherwise barrage him with fists and feet *after* he was subdued and non-resistant.

The difficulty for the defendants is that their assertion of qualified immunity is at heart a reverse mea culpa: "we didn't do it." With Francis asserting in his deposition that "they did too do it," there is a fundamental factual dispute. Because the disputes involve what the conduct of the officers actually was as well as what were the "circumstances" in which they acted -- key elements of the second prong of the qualified immunity inquiry -- I cannot conclude as a matter of law that defendants Angelo and Woolley are entitled to qualified immunity. *See Johnson*, 515 U.S. 304 (determining that in an excessive force/arrest case where the officers asserted a qualified immunity that was at heart a "we didn't do it" defense, the denial of summary judgment on qualified immunity grounds was not an appealable final decision because, rather than deciding the matter on an "abstract issue of law" (e.g., the right was not clearly established), the district court made a determination that there was a genuine issue of material fact that required trial); *Jones*, 26 F.3d 727 (affirming the denial of summary judgment on qualified immunity grounds, defendants having contested, citing insufficiency of evidence, that they struck, punched, or kicked the § 1983 plaintiff/arrestee); *see also Miller*, 220 F.3d at 495 (concluding, reviewing a similar arrest factual dispute, that officers were not entitled to qualified immunity, noting: "In essence, what we have here is a credibility question. If the

officers' version of the events is true, [the plaintiff] was not mistreated. If the claims in [the plaintiff's] lonely affidavit, however, are true, he has a case."); *Fowles*, 886 F. Supp. at 900-01 (concluding that the arrestee/plaintiff's assertion that the sheriff deputies hit him with a flashlight, maced, punched, kicked, and grabbed his hair without provocation precluded the entry of summary judgments in favor of the defendants on qualified immunity grounds because "no reasonable police officer could conclude that the [d]efendants' use of force was not in violation of [the plaintiff's] clearly established rights").

2. Fourth Amendment Constitutional Violation - Excessive use of force

The Supreme Court has made clear that claims like Francis's fall within the ambit of the Fourth Amendment:

> Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable ... seizures" of the person.

Graham v. Connor, 490 U.S. 386, 394 (1989); *see also id.* at 395 (concluding that the "more generalized notion of 'substantive due process'" does not apply to claims of this ilk);. *accord Comfort v. Town of Pittsfield*, 924 F. Supp 1219, 1228 (D. Me. 1996) ("The Fourth Amendment protects against the use of excessive force by police officers in carrying out an arrest.").

The Fourth Amendment inquiry annunciated in *Graham* is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivations." 490 U.S. at 397 (observing that evil or good intention of the arresting officer do not enter into the

"objectively reasonable" equation). *Accord Napier*, 187 F.3d at 182-83.[12]

This inquiry requires "a careful balancing," examining the type and extent of the alleged infringement of Francis's Fourth Amendment right on one hand and the governmental interests at stake on the other, with "allowance for the fact that police officers are often forced to make split-second judgments – in circumstance that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396 –97. S*ee also Roy*, 42 F.3d at 695 (describing the *Graham* standard as "comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present"). This undertaking requires "careful attention to the facts and circumstance of [this] case, including the severity of the crime at issue, whether [Francis] pose[d] an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Excessive force claims can run a continuum from minor to major contact, resulting in minor to major injury. While it is true that some minor pushing or shoving by police officers may not rise to the level of excessive force, *see Alexis*, 67 F.3d at 352, it also settled that a "trialworthy 'excessive force' claim is not precluded merely because only minor injuries were inflicted by the seizure." *Id.* at 353 n.11.

It would be Francis's burden at trial to prove by a preponderance of the evidence that the police officers used excessive force against him when they arrested him, and it is through

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[12] Francis's allegation that the officers used racial slurs during the incident would not be relevant in applying this objectively reasonable test. However, "in assessing the credibility of an officer's account of the circumstances that prompted the use of force, a factfinder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen." *Graham*, 490 U.S. at 399 n.12. *Accord Alexis*, 67 F.3d at 352 n.9.

the prism of this evidentiary burden that I analyze this motion for summary judgment. *See Tatro*, 41 F.3d at 14 (preponderance of the evidence standard applies); *see also Anderson*, 477 U.S. at 252, 254.

As to defendant Moor, it is uncontroverted that he was not at the scene of the arrest. The naming of Moor as a defendant was a misstep by Francis precipitated by the similarity of his name to that of a different Bangor Police Officer who was involved in the Francis arrest, Douglas Moore. Francis has conceded as much in his untimely and, thus, unsuccessful efforts to substitute Douglas Moore as the third defendant. Therefore, viewing the facts in a light most favorable to Francis, there are no facts alleged that in truth involve Moor, let alone a fact that is material to Francis's suit under § 1983. Moor is entitled to judgment as a matter of law.

The factual disputes that prevent the entry of summary judgment for the other defendants on qualified immunity grounds also prevent my entry of summary judgment for the defendants on the grounds that Francis has not made out a constitutional violation under the Fourth Amendment. It is the "we didn't do it" quandary: Francis says they did it and the defendants say they didn't.

The factual milieu of the *Graham* "totality of the circumstance" exploration may be a little more sympathetic towards the defendants than the starker qualified immunity review. In the latter review, the facts are held up against the pre-existing law and viewed through the eyes of an objectively reasonable officer. When looking at the facts to see if there is substantive liability, however, the focus is on the matters at hand and how a reasonable officer would respond. Concern about what is the "clearly established law" may not fall out of the equation (in that it goes to the reasonableness of the officer's

response), but it certainly falls out of the limelight. For instance, the undisputed fact that Francis led Angelo on a prolonged and dangerous high-speed chase prior to the incident takes on greater import under the totality of the circumstances review. For Angelo, at least, the situation seems to have been "tense, uncertain, and rapidly evolving." *Graham*, 490 U.S. at 396-97. Also expressly relevant under *Graham* is the undisputed fact that Francis, in undertaking a high-speed escape by car and, by exiting the car and heading up the knoll, was "attempting to evade arrest by flight." *Id.* at 396.

However, there are key material facts about the circumstance of the arrest that are in dispute. Francis asserts that once Angelo caught up to him and grabbed him by the belt he immediately gave up the chase and offered no resistance. If this was the case, was it objectively reasonable for Angelo and Woolley to exert any significant force?[13] I certainly could not make such a call as a matter of law.[14]

Case law from this district, treating excessive force claims on facts with marked resemblance to the dispute before me strongly supports my determination. *See, e.g.*, *Hodsdon v. Town of Greenville*, 52 F. Supp. 2d 117, 122 (D. Me. 1999)(concluding that an officer's alleged conduct while making a drunk driving arrest, consisting of rough handling including the slamming of the arrestee's head down on the police car and hitting him on the back of the head with a baton or flashlight while handcuffed in the police car,

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[13] The defendants point out that Francis has not identified with precision which one of the defendants he calls to answer for the different complained-of blows and injuries. Francis's lack of clarity as to which officers administered which blows does not defeat his claim. *See Miller*, 220 F.3d at 494-95 (reversing summary judgment in favor of officer defendants in an action involving an excessive force claim, explaining that the inability of the plaintiff to pinpoint the attacking officer did not defeat his claim, observing that the defendants' direct participation in the right deprivation was not required because officers who do not take the opportunity to prevent the rights violation by a fellow officer can be held liable); *Priester*, 208 F.3d at 927(stressing, when reviewing comparable circumstances, that there is § 1983 liability for failure to intervene); *accord Comfort*, 924 F. Supp. at 1228 n.4; *Fowles*, 886 F. Supp at 901 n.8.

[14] If I were able to accept as true the Defendants' version of events, in my view, the deferential *Graham* standard would carry the day and I would grant this motion.

represented material facts under the Fourth Amendment standard precluding summary judgment for the defendant); *Comfort*, 924 F. Supp. at 1228-29 (concluding that the jury could find that the officers' alleged aggression, ramming a subdued and handcuffed arrestee into the door, was more force than was necessary to effectuate the arrest and that therefore summary judgment for defendants on the plaintiff's Fourth Amendment claim was not appropriate); *McLain*, 847 F. Supp. at 973-74 & nn.3&4, 976-77 (denying summary judgment, describing similar contending versions of an arrest, in which the officer asserted that the plaintiff was resisting arrest, that it was necessary to force him to the ground, and that he was injured due to his own thrashing about, while plaintiff described himself as compliant, having advised the officer he need not use force, but was subjected to excessive force resulting in a six-stitch head laceration, and various debilitating strains). In short, in this "he says, they say" dispute the defendants' liability under the Fourth Amendment will depend on the credibility of the witnesses, and assessing their credibility is clearly the domain of the fact-finder at trial.

Conclusion

For these reasons, I **DENY** the motion for summary judgment as to Angelo and Woolley on both their asserted grounds and I **GRANT** the motion as to Moor.

So Ordered.

Dated this 23rd day of February, 2001.

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Margaret J. Kravchuk
U.S. Magistrate Judge

PR1983

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-80

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Cause: 42:1983 Civil Rights Act

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